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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 605

BEACON MILLING COMPANY, INC., *Petitioner*,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY, *Respondent*.

PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

BEACON MILLING COMPANY, INC.

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October 14, 1944.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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THE NEW YORK CENTRAL RAILROAD COMPANY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI.

Beacon Milling Company, Inc., respectfully presents this petition and prays that this Honorable Court grant a writ of certiorari and review the decision of this case by the Court of Appeals of the State of New York, which said decision was delivered on July 19, 1944, and reversed judgments of the Appellate Division in the Fourth Judicial Department and of the Supreme Court, Monroe County, in favor of petitioner; and in support of its petition Beacon Milling Company, Inc., represents:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

The New York Central Railroad Company (hereinafter called New York Central) filed its complaint in the Supreme Court of the State of New York for Monroe County, against Beacon Milling Company, Inc., (hereinafter called Beacon) demanding judgment in the sum of Ten thousand six hundred three dollars and 65 cents ($10,603.65) plus interest thereon as charges, more specifically described as "emergency charges," claimed to be due by Beacon to it for the transportation of certain property in interstate commerce in the period April 18, 1935-December 31, 1936. (ff. 4-25)* About 4650 charges on upwards of 2000 interstate shipments were involved. (f. 9) The details of these various transactions are not included in the record because of the stipulation of the parties (ff. 16-24) that three individual shipments, described in the Stipulation (ff. 18-20) and supported by the documents evidencing the transportation (ff. 115-124) "are representative and typical to such an extent that determination of the legal rates applicable to the same will be a determination of the issue with respect to all the several shipments * * *." (f. 18)

On August 29, 1941, John Van Voorhis, Justice of the Supreme Court rendered his decision (ff. 25-33) holding that the charges claimed were not lawfully due. September 24, 1941, the Court entered its order (ff. 34-35) of judgment in favor of Beacon, and dismissing the New York Central's complaint.

The said judgment and order were by the New York Central appealed to the Appellate Division of the Supreme Court, Fourth Department, which entered its Judgment

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* Contemporaneously, Lehigh Valley Railroad Company filed in the same court its similar complaint against Beacon, the amount of the charges claimed to be due it for interstate transportation of Beacon's property being $8,156.97. By agreement of the parties this Lehigh Valley complaint is held in abeyance pending ultimate disposition of the New York Central complaint, and will then be disposed of accordingly.

of Affirmance on April 2, 1943. (ff. 73-75) No opinion was rendered by the Appellate Division. (f. 81) Leave to Appeal to the Court of Appeals was granted to the New York Central by the Appellate Division in its order dated June 6, 1943. (ff. 76-77)

The emergency charges which are the subject of the complaint are contended by the New York Central to have been authorized by the Interstate Commerce Commission in two reports cited *Emergency Freight Charges, 1935*, 208 I. C. C. 4, decided March 26, 1935, *s. c.*, 215 I. C. C. 439, decided June 9, 1936, and the accompanying orders. (ff. 37, 70-72, also 46-48) Beacon contended that by virtue of an earlier report of the Commission cited *Beacon Milling Co.* v. *New York Central R. Co.*, 157 I. C. C. 635, decided October 10, 1929, sometimes herein cited as the *Beacon case*, and the outstanding and effective order entered in connection therewith (ff. 38-45) the said emergency charges could not lawfully be assessed against Beacon's traffic.

On July 19, 1944, the Court of Appeals handed down its opinion, *New York Central Railroad Company* v. *Beacon Milling Company, Inc.*, 293 N. Y. 218, reversing the judgments of the courts below, but with two qualifications:

> (1) Because the New York Central had taken no appeal from the denial by the trial court of its motion for summary judgment, the Court of Appeals held it was without power now to direct summary judgment in favor of the New York Central.
>
> (2) Reversal of the judgments below was without prejudice to any proceedings which Beacon may hereafter institute before the Interstate Commerce Commission.

Despite these qualifications, the opinion of the Court of Appeals is believed to be a final opinion within the rule laid down by this Court in *Department of Banking* v. *Pink*, 317 U. S. 264, decided December 21, 1942. As respects the first qualification, the Court of Appeals has nevertheless decided all the issues; its decision definitely and finally de-

termines the merits of the law suit. Furthermore, the decision adjudicates the right of the New York Central to collect the emergency charges in the computed amount set out in the stipulation of agreed facts. (R. 23-24) Therefore, the New York Central may now petition the Supreme Court of Monroe County to enter an order denying its motion for summary judgment and then appeal to the Appellate Division. The Appellate Division would reverse on the basis of this decision of the Court of Appeals and order judgment in the amount stipulated to be due, unless said decision of the Court of Appeals is reversed by this Honorable Court. See Civil Practice Act of New York State, section 612; *Naftal* v. *Jarvis*, 203 N. Y. A. D. 75; *Tossiny* v. *The City of New York*, 211 N. Y. A. D. 816. Petitioner is informed and believes that the New York Central will in due time proceed in the Supreme Court of Monroe County to cure the defect in its position.

As respects the second qualification, Beacon is under no necessity to proceed before the Interstate Commerce Commission, as the issue to be determined is one of law and not of commission administration.

B. REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

1. The issue arises solely in connection with the transportation of property by common carriers in interstate commerce.

2. Determination of the issue requires the ascertainment of the lawful rates and charges applicable to the transportation of property by the New York Central for Beacon.

3. Ascertainment of the lawful rates and charges requires only the construction of certain reports of the Interstate Commerce Commission and its orders entered in connection therewith, and of the tariffs of rates and charges published by the New York Central in assumed conformity with such orders. No administrative action is required.

4. The Court of Appeals erred in construing the reports and orders of the Interstate Commerce Commission in *Emergency Freight Charges, 1935,* 208 I. C. C. 4, 215 I. C. C. 439, and in concluding that said reports and orders overrode the earlier report and order of the Commission in *Beacon Milling Co.* v. *New York Central R. Co.,* 157 I. C. C. 635.

5. The Court of Appeals erred in holding that the emergency transit rates published by the New York Central as Items 70 and 75 of the emergency tariffs overrode the said earlier report and order of the Commission in *Beacon Milling Co.* v. *New York Central R. Co., supra,* so far as necessary to permit the emergency rates and charges to be applied to the transportation and service here in question.

6. The Court of Appeals erred in holding that the so-called legal rate and charge published by the New York Central in its tariffs took precedence over the lawful rate and charge prescribed by the Interstate Commerce Commission.

7. The Court of Appeals erred in holding that accordingly Beacon must find its remedy in proceedings before the Interstate Commerce Commission for administrative relief.

8. The Court of Appeals erred in failing to affirm the judgments of the Supreme Court of Monroe County and of the Appellate Division of the Supreme Court in the Fourth Judicial Department.

Wherefore, your Petitioner, Beacon Milling Company, Inc., respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the State of New York and commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and titled on its docket as No. 191, *The New York Central Railroad Company, Plaintiff-Appellant* v. *Beacon Milling Company, Inc.,*

Defendant-Respondent; and that the said judgment of the said Court of Appeals may be reversed by this Honorable Court; and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

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